18-2667-cr

United States Court of Appeals

for the

Second Circuit

UNITED STATES OF AMERICA,

Appellee,

– v. –

EVAN GREEBEL,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR AMICI CURIAE LEGAL ETHICISTS AND PROFESSIONAL LIABILITY PRACTITIONERS IN SUPPORT OF APPELLANT AND REVERSAL

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IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici are attorneys who teach, write, and practice in the fields of legal ethics and professional liability: Hal Lieberman is the co-author of *New York Attorney Discipline* as well as the former Principal Trial Attorney and Chief Counsel for the Departmental Disciplinary Committee in New York's First Department. Lawrence Fox is the George W. and Sadella D. Crawford Visiting Lecturer in Law at Yale Law School as well as a former chairman of the American Bar Association's Standing Committee on Ethics and Professional Responsibility and a former chairman of the ABA's Section of Litigation. Jonathan Lupkin is a litigator with over 25 years of experience, much of which has involved cases implicating attorney liability and legal ethics. He also serves on the Chief Judge's Commercial Division Advisory Council, on which he has been the principal drafter for several of the amendments to the Statewide Rules of the Commercial Division, and he is the former Chair of the Commercial and Federal Litigation Section of the New York State Bar Association. Michael Ross, a former Assistant United States Attorney in the Southern District of New York, has been an adjunct professor of legal ethics at the Benjamin N. Cardozo Law School since 1980 and simultaneously at Brooklyn Law School since 2005. He serves on the New York

State Bar Association's Committee on Professional Discipline and the New York County Lawyers' Association Committee on Professional Discipline.[1]

Amici are concerned that the district court's jury instructions incorrectly articulated the standard governing a lawyer's duty to disclose, thus creating confusion and uncertainty among members of the bar about their duties to their clients and about potential criminal liability arising out of compliance with those duties.

Amici take no position on Mr. Greebel's guilt or innocence, or whether he breached any ethical obligation or fiduciary duty. Indeed, *Amici* take no position on any factual issues in this case. Rather, *Amici*'s interest in this appeal is purely doctrinal. We address only the narrow issue of the standard for determining whether a lawyer has breached her fiduciary duty to disclose in the context of a criminal wire-fraud charge—an issue that arguably impacts every member of the bar within this Circuit.

[1] Pursuant to Local Rule 29(a)(4)(E) and Local Rule 29.1, Amici state that Greebel's counsel has reviewed and commented on drafts of this brief. No party contributed money that was intended to fund the preparation or submission of this brief.

PERMISSION TO FILE *AMICUS* BRIEF

Amici state that all parties have consented to the filing of this brief, and *Amici* thus have permission to file the brief under Rule 29(a)(2) of the Federal Rules of Appellate Procedure.

ISSUE PRESENTED BY *AMICI*

Did the district court incorrectly charge the jury on wire fraud by omission by instructing that, in the context of an attorney-client relationship in which the client is a corporation, "a fiduciary owes a duty to disclose all material facts known to him or her concerning the transaction entrusted to it"?

SUMMARY OF ARGUMENT

Evan Greebel was a lawyer at Katten Muchin Rosenman LLP who provided legal services to Retrophin, Inc., a company for which Martin Shkreli was Chief Executive Officer. Greebel and Shkreli were charged, *inter alia*, with conspiracy to commit wire fraud and tried separately. At the end of Greebel's trial, the district court incorrectly instructed the jury as to Greebel's fiduciary duty to disclose information pursuant to the attorney-client relationship. *Amici* encourage this Court to correct that erroneous instruction.

The district court's instruction improperly articulated the standard governing a lawyer's duty to disclose information to her client. In relevant part, the district court instructed the jury as follows, based on the Restatement of Agency:

> A duty to disclose material facts may also arise in the context of a fiduciary relationship, such as the attorney-client relationship. As a result of this relationship, an attorney must act on behalf of, and for the exclusive benefit of, the attorney's client, rather than for the benefit of the attorney or any other party. *I instruct you that a fiduciary owes a duty to disclose all material facts known to him or her concerning the transaction entrusted to it.*

SPA-54 (emphasis added).[2] The third sentence is, from an ethicist's perspective, overly broad and untethered to any standard governing the attorney-client relationship in any jurisdiction.

The lawyer-client relationship is unique and, for that reason, the fiduciary duty owed to the client arises out of specific and well-defined rules governing the lawyer's conduct in the jurisdiction where she practices. Here, the jury charge was incorrect because it did not identify *to whom* the lawyer owes the duty to disclose, and did not identify the scope of any such disclosure. More specifically, as to a corporate client (such as Greebel's client in this case), the instruction failed to explain to whom *within* the client's organizational structure the lawyer must report, and the circumstances under which a lawyer may have a duty to report to a higher authority within the organization. Instead, the district court relied on the more generic Restatement of Agency to explain a lawyer's fiduciary duty to disclose in the context of a criminal wire-fraud jury charge.

[2] "SPA" refers to the Special Appendix of Defendant-Appellant's opening brief (Dkt. No. 43).

As we explain below, the appropriate source to examine when considering a defendant lawyer's potential duty to disclose for purposes of the wire-fraud statute should be the ethical rules applicable in that lawyer's jurisdiction. Relying on that robust body of guidance aligns a lawyer's ethical duties with her fiduciary duties and provides predictability to lawyers and clients. Sound public policy weighs in favor of applying the rules of professional conduct from the lawyers' jurisdiction when defining a lawyer's fiduciary duty. Rules of professional conduct contain well-developed ethical parameters that lawyers know, understand, and try to follow. The rules work and are consistent with the expectations of both attorneys and their clients. It is, in our view, ill-advised to impose a completely *different* (and less precise) standard, particularly as the basis to impose criminal liability. In fact, doing so would be counterproductive—putting lawyers in the unenviable position of choosing between ethical obligations and potential criminal liability.

For these reasons, the district court erred by failing to charge the jury as to the lawyer's duty to disclose, as defined by the New York Rules of Professional Conduct. More generally, *Amici* encourage this Court to clarify that a lawyer's fiduciary duty to disclose in the context of a criminal charge of wire fraud by omission is governed by the ethical rules of the jurisdiction in which the lawyer practices. *Amici* thus propose an instruction (set forth in Section III, *infra*) that is consistent with the New York Rules of Professional Conduct. Most critically, we

propose that, on remand, the district court charge the jury that a lawyer representing a corporation has an affirmative *duty*—as opposed to a mere option—to disclose information to a higher authority within the corporation only where the lawyer knows that the corporation will likely suffer a substantial injury, and the lawyer has no other reasonable alternative to prevent that injury.

ARGUMENT

The Court reviews jury instructions de novo. *See, e.g.*, *United States v. Prado*, 815 F.3d 93, 100 (2d Cir. 2016). An error occurs when an instruction either does not "adequately inform the jury on the law" or "misleads the jury as to the correct legal standard." *Id*. (citation omitted).

As to conspiracy to commit wire fraud, the district court first instructed the jury that "[a] duty to disclose material facts may also arise in the context of a fiduciary relationship, such as the attorney-client relationship." SPA-54. This much of the court's instructions was correct.[3]

[3] "[W]hen dealing with a claim of fraud based on material omissions, it is settled that a duty to disclose 'arises [only] when one party has information that the other [party] is entitled to know because of a fiduciary or other similar relation of trust and confidence between them.'" *United States v. Szur*, 289 F.3d 200, 211 (2d Cir. 2002) (quoting *Chiarella v. United States*, 445 U.S. 222, 228 (1980) (alterations in original)). Because "an attorney stands in a fiduciary relationship to the client," *Graubard Mollen Dannett & Horowitz v. Moskovitz*, 86 N.Y.2d 112, 118 (1995), it follows that a lawyer may commit fraud by failing to disclose information to his client.

But the district court then instructed the jury, based on the inapplicable (and overbroad) fiduciary duty described in the Restatement of Agency, that "a fiduciary owes a duty to disclose all material facts known to him or her concerning the transaction entrusted to it." SPA-54-55. That part of the instruction was *not* correct. As to a lawyer's fiduciary duties, the district court's instructions should have been based on the obligations laid out in New York's Rules of Professional Conduct—not the Restatement of Agency.

I. The District Court Incorrectly Articulated the Standard for a Lawyer's Duty to Disclose Information to Her Client

At a macro level, in New York, "[i]t is well settled that the relationship of client and counsel is one of unique fiduciary reliance and that the relationship imposes on the attorney the duty to deal fairly, honestly and with undivided loyalty including maintaining confidentiality, avoiding conflicts of interest, operating competently, safeguarding client property and honoring the clients' interests over the lawyer's." *Ulico Cas. Co. v. Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 A.D.3d 1, 9 (N.Y. App. Div. 2008) (internal citations and quotation marks omitted). On a more granular level, a lawyer's fiduciary duty owed to her client is laid out with precision and specificity by the New York Rules of Professional Conduct.

The district court instructed that, in the attorney-client context, "a fiduciary owes a duty to disclose all material facts known to him or her concerning the transaction entrusted to it." SPA-54. Under the New York Rules of Professional

Conduct, however, that instruction is incorrect for numerous reasons. In context, the district court's primary error was its failure to explain *to whom* Greebel owed a duty to disclose within the organizational structure of Greebel's corporate client, and under what circumstances disclosure was required.

As discussed in Greebel's brief, a lawyer represents the corporation—not its officers, employees, or shareholders—and reports to the organization through the individual or individuals appointed by the corporation for that purpose. (*See* Greebel Br. 30.[4]) A lawyer does *not* have a general obligation to report up the corporate ladder. A reporting-up obligation *may* arise under the Rules of Professional Conduct only under a narrow set of circumstances. *See* N.Y. Rules of Prof'l Conduct, R. 1.13(b).

Under Rule 1.13(b), a lawyer representing a corporation *may* have an obligation to refer a matter "to higher authority in the organization" where the lawyer knows that a corporate officer or employee has violated, or intends to violate, a legal obligation or where the officer or employee has done something, or intends to do something, that "is likely to result in substantial injury to the organization." But the rule does not require the lawyer to do so. It *requires* only

[4] *See also* N.Y. Rules of Prof'l Conduct, R. 1.13(a) ("[A] lawyer employed or retained by an organization . . . is the lawyer for the organization and not for any of the constituents.")

that the lawyer "proceed as is reasonably necessary in the best interest of the organization." *Id.* The full text of Rule 1.13(b) is set forth below:

> If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action or intends to act or refuses to act in a matter related to the representation that (i) is a violation of a legal obligation to the organization or a violation of law that reasonably might be imputed to the organization, and (ii) is likely to result in substantial injury to the organization, *then the lawyer shall proceed as is reasonably necessary in the best interest of the organization.* In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures *may* include, among others:
>
> (1) asking reconsideration of the matter;
>
> (2) advising that a separate legal opinion on the matter be sought for presentation to an appropriate authority in the organization; and
>
> (3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

Id. (emphasis added).

The limited scope of the affirmative fiduciary duty created by Rule 1.13(b) is apparent on its face. Even when triggered, the rule does not always *require* the lawyer to report up the corporate ladder. Rather, the lawyer *must* "proceed as is reasonably necessary in the best interest of the organization," which *may* include

reporting up to a higher authority in the organization.[5] It follows that a lawyer has an affirmative fiduciary duty to disclose information to a higher authority in the organization only where doing so is the exclusive way to proceed that is "reasonably necessary in the best interest of the organization." Where a lawyer has other reasonable options, she has no *duty* to disclose.

For the reasons described below in Section II, in the absence of controlling caselaw, it is *Amici*'s view that the New York Rules of Professional Conduct are the only appropriate source for determining a lawyer's fiduciary duty governing the conduct at issue in this case. We note, however, that Section 96 of the Restatement of Law Governing Lawyers is consistent with Rule 1.13. Section 96 articulates a duty to report up the corporate ladder only under narrowly proscribed circumstances where the lawyer knows that an agent of the corporation is violating a legal duty in a way that will substantially harm the corporation and reasonably believes that reporting up would be in the best interests of the organization.[6] *See* Restatement (Third) of the Law Governing Lawyers § 96.

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[5] Paragraph 6 of the preamble to the Rules of Professional Conduct provides that "[s]ome of the Rules are imperatives, cast in the terms 'shall' or 'shall not' . . . while "[o]thers, generally cast in the term 'may,' are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional judgment."

[6] In its erroneous jury charge, the district court appears to have relied on Section 8.11 of the Restatement (Third) of Agency, which describes the generic duty for an agent to provide information to his principal. For the reasons discussed below in

Critically, as the district court properly instructed the jury in the context of a conspiracy to commit wire fraud, "[d]eceitful statements of half-truths or the concealment or omission of material facts, *when under a duty to disclose these material facts*, may . . . constitute false or fraudulent representations." SPA-54 (emphasis added). It follows that the inverse is also true: an omission does *not* constitute a false or fraudulent representation when there is *no* duty to disclose. Thus, given the narrow scope of the duty to disclose under Rule 1.13(b), a lawyer does not violate any duty to her client by failing to report up the corporate ladder unless the lawyer had a duty to do so—that is, unless the lawyer knew that the client was being harmed and reporting up was the *only* reasonable way to proceed in the best interest of the organization. The district court's instructions failed to explain this critical—and perhaps dispositive—rule. The jury instructions did not "adequately inform the jury of the law" and, thus, the district court committed error.

II. The Fiduciary Obligations Between Lawyer and Client Are Defined by the Jurisdiction's Rules of Professional Conduct

The Southern District recently applied the New York Rules of Professional Conduct in determining the scope of a lawyer's duty to disclose information to his client in *Gottsch v. Eaton & Van Winkle LLP*, No. 17 CV 6974-LTS-BCM, 2018

Section II, the Restatement of Agency is not an appropriate source for determining a lawyer's fiduciary duties.

WL 4609111, at *3 (S.D.N.Y. Sept. 24, 2018) (appeal pending). There, the plaintiff asserted a claim against his former lawyers for breach of fiduciary duty based, in part, on (i) the lawyers' failure to tell the client that the lawyers did not appear for an appellate argument and (ii) the lawyers' failure to tell the client that he could appeal the appellate court's decision. *Id.* The court explained that the plaintiff's "concealment theory appears to be premised on the assumed existence of a fiduciary duty to disclose to the client each decision made by an attorney in the course of the client's representation, so that the client would be in a position to terminate the relationship upon disagreement with each such decision." *Id.* While recognizing an attorney's general fiduciary duties under New York law, the court concluded that there was "no basis for the proposition that attorneys have a fiduciary duty to report to their clients each and every decision made by the attorney on the client's behalf." *Id.* In support of its conclusion, the court cited New York Rule of Professional Conduct 1.4—implicitly acknowledging that a New York lawyer's fiduciary duties are derived from the duties spelled out in the Rules of Professional Conduct. *See id.* n. 4.

Although both state and federal courts frequently discuss the general principle that lawyers owe certain fiduciary duties to their clients, *Amici* are not aware of any decision in this Circuit other than *Gottsch* that specifically addresses either a lawyer's duty to disclose information to his client or the source for

determining the contours of a lawyer's particular fiduciary duty to disclose. It is *Amici*'s view, however, that the approach taken by the Southern District in *Gottsch* is correct, for several reasons.

A. Grounding Fiduciary Duties to Disclose on the Rules of Professional Conduct Is Consistent with Sound Public Policy

Sound public policy weighs in favor of application of the New York Rules of Professional Conduct to define a lawyer's fiduciary duties.

A jurisdiction's rules of professional conduct should be the authoritative source of a lawyer's fiduciary duties. Lawyers may be subject to discipline for failure to comply with rules of professional conduct. *See, e.g.*, N.Y. Rules of Prof'l Conduct, Preamble ¶ 11 ("Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process."). Lawyers thus expend considerable time and resources—particularly when considering their duties to clients—to ensure compliance with their jurisdictions' rules of professional conduct. *Amici*, as legal-ethics practitioners, are uniquely aware of this. Lawyers routinely hire *Amici* to vet and sign off on their activities.

In doing so, *Amici* themselves look primarily to rules of professional conduct, and the court cases and bar association ethics decisions interpreting them, in advising lawyers about their duties to clients. Put differently, it is *Amici*'s experience that lawyers in the day-to-day practice of law view their jurisdictions' rules of professional conduct as the primary source of authority concerning their

fiduciary duties, and well-meaning lawyers consequently make every effort to conform their behavior to those rules. The rules thus set out the real-life standards that inform actual attorney-client relationships.

Consequently, for the imposition of criminal liability based on a breach of fiduciary duty, public policy weighs heavily in favor of looking to a jurisdiction's rules of professional conduct in determining whether a lawyer has breached his fiduciary duties. To promote compliance, ethical and fiduciary duties should be aligned.

The rules of professional conduct, moreover, provide detailed, well-developed guidance written by lawyers for lawyers. Lawyers should have the right to rely on that guidance in making difficult decisions. Based on that guidance, lawyers should know, with a reasonable degree of certainty, whether their conduct will subject them to civil, let alone criminal, liability.

By contrast, the Restatement of Agency, which is not addressed to lawyers in particular, is not helpful to lawyers in understanding their duties to an organization. The Restatement of Agency—the apparent basis for the district court's jury charge—provides relatively amorphous, high-level principles that are untethered to the unique circumstances of the attorney-client relationship. The Restatement of Agency addresses only generic principal-agent relationships. It lacks the specificity required to cover the complex set of fiduciary issues that arise in the lawyer-client

context. In fact, implicitly acknowledging the unique complexity of the lawyer-client relationship, there exists a *separate* restatement—the Restatement of Law Governing Lawyers—that provides more-detailed, situation-specific guidelines for numerous issues affecting the practice of law, including issues related to the lawyer-client relationship. *See*, Restatement (Third) of Law Governing Lawyers, Chapter 6 (Representing Clients).

Given the specific guidelines prescribed by the Rules of Professional Conduct (and the Restatement of the Law Governing Lawyers), the Restatement of Agency should not be the source for determining a lawyer's fiduciary duties. For example, the Restatement of Agency does not distinguish between the duties of a lawyer representing an individual and a lawyer representing a corporation, partnership, or other organization—while the Rules of Professional Conduct and the Restatement of Law Governing Lawyers do make that vital distinction by expressly addressing the duties of a lawyer representing an organization. *See* N.Y. Rules of Prof'l Conduct, R. 1.13 ("Organization as Client"); Restatement (Third) of the Law Governing Lawyers § 96 ("Representing an Organization as Client"). The Restatement of Agency is too generic, providing lawyers (and jurors) with far less guidance than a jurisdiction's rules of professional conduct about how *lawyers* should act (as opposed to other agents). Deriving a lawyer's fiduciary duties from the Restatement of Agency thus breeds uncertainty.

It is thus *Amici's* view that to promote certainty and clarity as to potential criminal liability, this Court should expressly reject the Restatement of Agency as a source for a lawyer's fiduciary duties in situations covered by the relevant jurisdiction's rules of professional conduct and should declare that a jurisdiction's rules of professional conduct, as interpreted by the courts, provide the primary source for determining a lawyer's fiduciary duties.

B. Grounding Fiduciary Duties to Disclose on the Rules of Professional Conduct Is Consistent with the Academic Literature Concerning the Nature of Fiduciary Duties

Deriving a lawyer's fiduciary duties from the applicable rules of professional conduct is also consistent with prominent academic literature about the nature of fiduciary duties.

The somewhat amorphous "fiduciary" label is applied to a diverse array of relationships in which an agent acts on behalf of a principal: trustee/beneficiary; guardian/ward; partner/partner; corporate insider/investor; broker/client; and attorney/client, among others. In every one of these relationships, the fiduciary owes duties of loyalty and care to the principal. *See, e.g.*, Restatement (Third) Of Agency § 1.01; 8.01 et seq. (2006). But the precise duties flowing from agent to principal are different in each type of fiduciary relationship.

In their seminal article on fiduciary duties, Frank Easterbrook and Daniel Fischel offered a unifying theory. They argued that "a 'fiduciary' relation is a

contractual one characterized by unusually high costs of specification and monitoring." Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & Econ. 425, 427 (April 1993). In that context, "[t]he duty of loyalty replaces detailed contractual terms, and courts flesh out the duty of loyalty by prescribing the actions the parties themselves would have preferred if bargaining were cheap and all promises fully enforced." *Id.*

In the context of the attorney-client relationship, rules of professional conduct serve this very function; they flesh out lawyers' duties to clients by prescribing the actions the parties themselves presumably would have preferred if bargaining were cheap and all promises fully enforced. And, in fact, both lawyers and their clients generally understand that a lawyer's behavior is governed by those rules of professional conduct, together with the decisions interpreting them. It thus makes sense that, in determining a lawyer's fiduciary duties, courts would look exclusively to the jurisdiction's well-developed rules of professional conduct; this is precisely what the parties want and expect.

Conversely, it would make no sense for the courts to impose fiduciary duties inconsistent with a jurisdiction's rules of professional conduct because, in doing so, the court would frustrate the expectations of both the lawyer and client and impose obligations that neither party would have anticipated or agreed to.

C. Grounding Fiduciary Duties to Disclose on the Rules of Professional Conduct Avoids Raising Constitutional Problems with the Wire-Fraud Statute

The district court's instruction as to the duty to disclose, based on the Restatement of Agency rather than the well-defined New York Rules of Professional Conduct, risks rendering the wire-fraud statute unconstitutionally void for vagueness as applied. "The prohibition of vagueness in criminal statutes . . . is an 'essential' of due process, required by both 'ordinary notions of fair play and the settled rules of law.'" *Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018) (quoting *Johnson v. United States*, 135 S. Ct. 2551, 2557 (2015)). The void-for-vagueness doctrine "guarantees that ordinary people have 'fair notice' of the conduct a statute proscribes," *id.* (quoting *Papachristou v. Jacksonville*, 405 U.S. 156, 162 (1972)), and "requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (citing cases).

The federal wire fraud statute, 18 U.S.C. § 1343, provides that:

> [w]hoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme

> or artifice, shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

Neither the statute itself nor the interpretive caselaw gives fair notice to a ordinary person that a lawyer may violate the statute by failing, as the district court put it, "to disclose all material facts known to him or her concerning the transaction entrusted to it," SPA-54, especially given the failure to clarify the identity of the client or how the client is to be informed.

What was the premise for the district court's error? Its instruction was based loosely on the Restatement of Agency. *See* Restatement (Third) Of Agency § 8.11 (2006).[7] But, for the reasons discussed above, reasonable lawyers generally would not look to the Restatement of Agency to determine their fiduciary duties, and there is no precedent for doing so.

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[7] Even under the Restatement of Agency, the district court's instruction is incorrect. The Restatement does not require the wholesale disclosure of material facts to a principal. Rather, it provides:

> An agent has a duty to use reasonable effort to provide the principal with facts that the agent knows, has reason to know, or should know when
>
> (1) subject to any manifestation by the principal, the agent knows or has reason to know that the principal would wish to have the facts or the facts are material to the agent's duties to the principal; and
>
> (2) the facts can be provided to the principal without violating a superior duty owed by the agent to another person.

Rather, lawyers rely on their jurisdictions' rules of professional conduct to determine the duty owed to their clients. Every day, lawyers make decisions about how to best fulfill their fiduciary duties based on careful study of those rules—sometimes in close consultation with professional liability practitioners such as *Amici*, as discussed above. It is thus reasonable for lawyers to conclude they would not incur any criminal liability for conduct that complied with their jurisdictions' rules of professional conduct.

But it is highly unlikely that lawyers, and the professional-liability practitioners who advise them, would conclude—based on the language of the wire fraud statute or the cases interpreting it—that a lawyer would commit wire fraud based on a violation of the principles articulated in the Restatement of Agency. It is thus *Amici*'s view that the district court's charge risks imposing criminal liability for conduct that lawyers likely would not expect to violate the duties owed to a client. It should be rejected accordingly.[8]

This appeal vividly illustrates the problem. The standard articulated in the district court's instructions would require disclosure under circumstances where the New York Rules of Professional Conduct manifestly would not. It is thus

[8] *See, e.g.*, *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005) ("[W]hen deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail.")

possible under the district court's interpretation of the wire-fraud statute that Greebel, or a similarly situated lawyer, could be convicted of wire fraud despite believing—in good faith, and in reliance on the relevant rules—that he had no fiduciary duty to make the relevant disclosure. That outcome would not only be fundamentally unfair, but it would also risk being unconstitutional.

* * *

For all these reasons, *Amici* encourage this Court to hold that the fiduciary duty of lawyers to their clients in the context of a criminal wire fraud charge must be derived from, and interpreted in a manner consistent with, the rules of professional conduct for the jurisdiction in which the lawyer practices.

III. *Amici's* Proposed Jury Instructions

Amici respectfully encourage this Court to remand to the trial court with revised jury instructions modeled on the relevant provisions of the New York Rules of Professional Conduct. As to a lawyer's duty to disclose information to her corporate client, we propose the following instruction:

> A lawyer practicing in New York has a duty to promptly inform her client of "material developments in the [relevant] matter including settlement . . . offers," to "keep the client reasonably informed about the status of the matter," and to "promptly comply with a client's reasonable requests for information." N.Y. Rules of Prof'l Conduct, R. 1.4(a)(1). A lawyer may satisfy her duty to communicate with her client by communicating with any officer, employee, or agent of the client whom the lawyer reasonably believes to be authorized to communicate on behalf of the client with respect to the matter entrusted to the lawyer. *See* N.Y. Rules of Prof'l Conduct, R. 1.13(b).

> If the lawyer knows that someone associated with the client is engaged in, or intends to engage in, action that violates his legal obligation to the organization and is likely to result in substantial injury to the organization, the lawyer has a duty to proceed as is reasonably necessary in the best interest of the organization, which may include referring the matter to higher authority in the organization, which in a corporation would include the board of directors. *See* N.Y. Rules of Prof'l Conduct, R. 1.13. Consequently, a lawyer has an affirmative *duty*—as opposed to a mere option—to disclose information to a higher authority within an organization only where the lawyer has no other reasonable alternative to prevent substantial injury to the organization. *See id.*

CONCLUSION

For the reasons discussed, *Amici* respectfully encourage this Court to remand to the district court with the revised jury charge articulated above.

Dated: New York, New York
January 28, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. The foregoing brief complies with the type-volume limitation of Second Circuit Rules 29.1(a) and 32.1(a)(4) because, excluding those parts of the brief exempted by Fed. R. App. P. 32(f), it contains 5288 words according to the Word Count feature on Microsoft Word 2016.

2. The foregoing brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionately spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

Dated: New York, New York
January 28, 2019

/s/ Jonathan D. Lupkin
Jonathan D. Lupkin

CERTIFICATE OF SERVICE

I hereby certify that on January 28, 2019, I caused an electronic copy of the foregoing brief to be filed with the Clerk of Court for the U.S. Court of Appeals for the Second Circuit using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: New York, New York
January 28, 2019

/s/ Jonathan D. Lupkin
Jonathan D. Lupkin

4830-7778-6244, v. 10